

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1143

To be argued by
ANGELO T. COMETA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

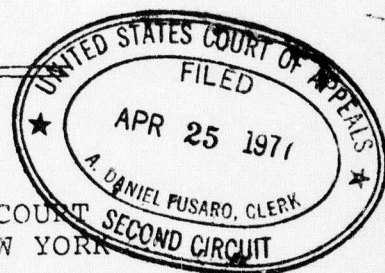
HOWARD E. SAFT,

Defendant-Appellant.

B
Pgs
Docket No. 77-1143

APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



PHILLIPS, NIZER, BENJAMIN
KRIM & BALLON
Attorneys for Defendant-
Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:

Angelo T. Cometa
Sheila Ginsberg
David Richenthal
Jonathon Warner

TABLE OF CONTENTS

Table of Cases	i
Statutes Involved	1
Questions Presented	2
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	3
Statement of Facts	3
Argument	
1. The District Court's refusal to apply Fed. R. Crim. P. Rule 11, Effective December 1, 1975, to appellants' Sept- ember 1, 1976 guilty plea was an error and the failure to comply with that Rule man- dates vacatur of the conviction and remand for an opportunity to plead anew.	
2. It was reversible error to deny appellant's presentence motion to withdraw his guilty plea when the reasons for withdrawal were that the plea was both violative of Rule 11 and involuntary.	
Conclusion	32

TABLE OF CASES

Desist v. United States, 394 U.S. 244 (1969)	16,18
Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964)	29
Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975)	16,18
Halliday v. United States, 394 U.S. 831 (1969). . .	16
Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974).	22,23
Kay v. United States, 303 U.S. 1 (193)	24

Kercheval v. United States, 274 U.S. 220 (1927) . . .	.28
Kloner v. United States, 535 F.2d 730 (2d Cir. 1976)	.17,19
Linkletter v. Walker, 381 U.S. 618 (1965)	.16,18
Majko v. United States, 457 F.2d 790 (7th Cir. 1972)	.23
McCarthy v. United States, 394 U.S. 459 (1969) . . .	.14,17,21, 23,24
Nunez Cordero v. United States, 533 F.2d 723 (1st Cir. 1976)	.29
Smith v. Grady, 312 U.S. 329 (1941)	.22
United States v. Cook, 487 F.2d 963 (9th Cir. 1973)	.29
United States v. Braverman, 522 F.2d 218 (7th Cir.), <u>cert. denied</u> , 96 S.Ct. 392 (1975) . . .	.24
United States v. Cody, 438 F.2d 287 (8th Cir. 1971) .	.23
United States v. Cortes Rios, Doc. No. 76 Cr. 867 (Goettel, J.)	.30
United States v. Goberman, 458 F.2d 226 (3rd Cir. 1972)	.24
United States v. Journet, 544 F.2d 633 (2d Cir. 1976)	.14,15,16,17, 18,19,20,21, 24,27
United States v. Lentz, 524 F.2d 69 (5th Cir.1975) .	.24
United States v. Michaelson, Doc. No. 76-1559, slip. op. 2615 (2d Cir. March 31, 1977)	.15,21,29
United States v. Needles, 472 F.2d 652 (2d Cir. 1973)	.28
United States v. Presley, 478 F.2d 163	.28
United States v. Rogers, 289 F.Supp. 726 (D. Conn. 1968)	.31
United States v. Stayton, 408 F.2d 559 (3rd Cir. 1969)	.29

STATUTES AND OTHER AUTHORITIES

Fed. R. Crim. P. Rule 32(a)	.28
18 U.S.C. §1014	.24
26 U.S.C. §7203	.28
26 U.S.C. §7207	.28
28 U.S.C. §2255	.17
Advisory Committee Notes to Rule 11, 18 U.S.C.A. pp. 19-27	.20,22
121 Cong. Rec., H. 7863 (daily ed. July 30, 1975) . .	.15
8 J. Moore <u>Federal Practice</u> (2d ed. 1976)	.22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -x

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 77-1143

HOWARD E. SAFT, :

Defendant-Appellant :

- - - - -x

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court's refusal to apply Fed. R. Crim. P. Rule 11, Effective December 1, 1975, to appellants' September 1, 1976 guilty plea was error and whether the failure to comply with that Rule mandates vacatur of the conviction and remand for an opportunity to plead anew.

2. Whether it was reversible error to deny appellant's motion to withdraw his guilty plea when the reasons for withdrawal were that the plea was both violative of Rule 11 and involuntary.

STATUTES INVOLVED

Fed. R. Crim. P., Rule 11. Pleas

* * *

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

* * *

STATEMENT PURSUANT TO RULE 28 (a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce), entered March 3, 1977, convicting appellant upon his plea of guilty to two counts of submitting false financial statements to federally insured banks (18 U.S.C. §1014), and one count of income tax evasion (26 U.S.C. §7201). Appellant was sentenced to concurrent two year terms of imprisonment on both counts of submitting false financial statements and a consecutive one year period of incarceration for tax evasion.

The District Court granted appellant's motion to proceed in forma pauperis and assigned Phillips, Nizer, Benjamin, Krim & Ballon to represent appellant pursuant to the Criminal Justice Act.¹ This Court has continued the assignment of Phillips, Nizer, Benjamin, Krim and Ballon on appeal.

Statement of Facts

Appellant Howard E. Saft was charged along with

¹At the time of his plea appellant was represented by David L. Fox, court-appointed counsel. Thereafter, on November 2, 1976 before sentence, appellant retained Phillips, Nizer, Benjamin, Krim & Ballon to represent him in his motion to withdraw the plea. After sentence, the District Court granted appellant leave to proceed in forma pauperis.

Norman Fialkow and Edward Weizer in twenty-two counts of the indictment² with conspiracy in violation of 18 U.S.C. §371 (count 1); with filing false financial statements for the purpose of influencing the actions of various banks in violation of 18 U.S.C. §1014 (counts 2 through 8); with mail fraud in violation of 18 U.S.C. §1341 (counts 9 through 21); and with income tax evasion in violation of 26 U.S.C. §7201 (count 22).

Appellant was the president of Adlay Jewelry, Inc., a company whose principal business was selling jewelry at retail department stores, such as S. Klein Department Stores Inc., Robert Hall Village and Clarkins. Co-defendants Norman Fialkow and Edward Weizer were members of Chaikin & Fialkow³ the accounting firm which performed accounting services for Adlay Jewelry, Inc.

The government's theory of the case was that during the period from 1972 until 1975 appellant, acting in concert with Fialkow, Weizer and Chaikin, submitted false financial statements to banks for the purpose of obtaining loans for Adlay Jewelry, Inc. It was also contended that the mails were used to further the scheme and that appellant, in his tax returns for 1973, substantially understated his income.

²The indictment is annexed as "B" to appellant's separate appendix.

³Leon Chaikin who was deceased at the time the indictment was filed, was named as an unindicted co-conspirator.

On September 28, 1976, appellant withdrew his plea of not guilty and pleaded to counts 3 and 6, charging submission of false statements to the Empire Bank and the National Bank of North America, respectively, and to count 22, charging income tax evasion.

A. The Plea Proceeding

At the outset of the proceedings defense counsel announced that appellant wanted to plead guilty, with some factual modifications, to counts 3, 6 and 22 in the indictment. (2⁴) Judge Pierce directed the clerk to read the relevant three counts⁵, but the Judge did not explain to appellant the nature of either the crime of filing false statements, or of tax evasion. There was no discussion in the record of the elements of each crime nor what the government would have to prove to establish guilt. Instead, in a colloquy with appellant the Judge ascertained that appellant had previously read the indictment, that his attorney had explained the charges, and that appellant said that he "understood" the charges to which he was pleading (4-7).

⁴ Numerals in parenthesis are references to pages in the transcript of the plea proceeding dated September 28, 1976. The entire transcript of that proceeding is annexed as "C" to appellant's separate appendix.

⁵Count 3 provides: The Grand Jury further charges:

From on or about the 1st day of January, 1973, up to and including the 1st day of January, 1974, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its sub-

The Judge then attempted to explain the rights appellant would relinquish by pleading guilty. While the judge enumerated several of those rights, he failed, specifically to inform appellant that: (1) he had the right to persist in his plea of not guilty; (2) he had the right to have the

(Footnote continued from last page) . . .

sidiaries as of December 31, 1971, and as of December 31, 1972, the purpose of influencing the action of the EMPIRE BANK, New City, New York, and Newburgh, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan in the amount of one million two hundred thousand dollars (\$1,200,000).

Count 6 provides: The Grand Jury further charges:

From on or about the 1st day of January, 1973, up to and including the 1st day of January, 1974, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1972, for the purpose of influencing the action of the NATIONAL BANK OF NORTH AMERICA, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan and extension of a loan in the amount of more than one million dollars (\$1,000,000).

Count 22 provides: The Grand Jury further charges:

1. On or about the 15th day of April, 1974, in the Southern District of New York, HOWARD E. SAFT, the defendant, who during the calendar year 1973 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by filing and causing to be filed with the Internal Revenue Service, an income tax return on behalf of himself and his wife, wherein it was stated that he and his wife had \$33,810.23 taxable income for the year 1973 and that the amount of income tax due and owing thereon was \$9,626.30, which return was false and fraudulent, as he then and there well knew, in that their taxable income for the year 1973 was in excess of \$140,000, and that for the year 1973 there was due and owing to the United States thereon an income tax of in excess of \$90,000.

assistance of counsel at trial; (3) if he pleaded guilty there would be no further trial of any kind; (4) if he pleaded, the court could ask him questions about the offense. ⁶

Thereafter, the Judge questioned appellant about the facts of the crimes charged. As to Count 3, appellant conceded that the portion of the financial statement which indicated that inventories had been conducted under the supervision of certain persons was untrue. Appellant also stated that the financial statements were submitted for the purpose of influencing the Empire Bank's actions (14).

However, when the prosecutor injected that appellant was also to concede that he knew that the amount of money he received from Adlay in 1972 was "substantially in excess" of the amounts revealed in the financial statements, appellant would only concede that the amount was "in excess" (15).

On Count 6 appellant set out his involvement by saying that it was "the same occurrence" as he had described in Count 3. In addition, appellant acknowledged that the false financial statements were submitted to influence the action of the bank in lending money to Adlay (16).

⁶The judge did tell appellant of his right to a jury trial, to cross-examine witnesses, to remain silent and to rely on the presumption of innocence. Further, he told appellant that by pleading guilty he would give up those rights and that the Court could impose sentence on him just as if a jury had brought in a verdict of guilty. As to sentence, the judge informed appellant that the maximum penalty was a two year term of imprisonment and a \$5,000 fine for each count of filing the false statements and a 5 year term of imprisonment and a \$10,000 fine for tax evasion (8-9).

With regard to Count 22, the colloquy established that appellant and his wife filed a joint income tax return for the calendar year 1973 and that the return knowingly indicated a taxable income less than the amount appellant actually received. Appellant disputed the amount alleged in the indictment explaining to the Judge that the exact figures had not yet been determined.

Thereafter the Judge accepted appellant's plea of guilty to Counts 3, 6 and 22.⁷ (22)

B. Motion to Withdraw the Plea

On November 23, 1976, prior to the imposition of sentence, appellant, through new counsel, moved to withdraw his plea of guilty on the ground that the plea was involuntary.

Appellant is a 53 year old businessman, who has had no prior criminal record, and no experience with the criminal law. In his supporting affidavit dated November 22, 1976 appellant explained that his plea was involuntary because he had been led by his earlier court-appointed counsel to believe that despite his consistent claim of innocence, he had no realistic choice but to plead guilty. Appellant revealed that throughout all his pre-trial conferences with counsel, including those held after his decision to plead guilty, appellant maintained that he was innocent. In particular, appellant asserted he consistently told his

⁷Prior to appellant's plea, Edward Weizer had pleaded guilty to a misdemeanor count. Two days after appellant's plea, Fialkow pleaded guilty to counts 2 and 4 in the indictment.

lawyer that he did not know nor did he have the requisite intent to defraud the banks or evade his income tax.⁸

An affidavit from David L. Fox, counsel at the time of the plea, confirmed that appellant had consistently asserted his innocence, even after the decision to plead guilty. Counsel asserted, however, that he had advised appellant not to plead guilty unless he believed himself guilty.

In the supplemental papers appellant also challenged the plea on the ground that the proceedings failed to comply with the requirements of Rule 11, Fed. R. Crim. P., in effect since December 1, 1975, almost 10 months before appellant's plea. Specifically, appellant asserted the

⁸ Appellant explained:

In 1972, Adlay was operating in approximately fifteen stores. In the next two years 1973 and 1974, Adlay undertook a major expansion into more Klein stores, thirteen stores of the Robert Hall chain, and another thirteen stores of the Unishop chain. During this hectic expansion period, I was travelling throughout the country on a regular basis. Practically all of my time and energy was focused on the opening of the more than two dozen new outlets in major department stores throughout the country.

Of course, substantial long-term financing was required for the 1973-74 expansion. The transactions with the banks in this expansion period were conducted by Adlay's accountant, Leon Chaikin, just as similar transactions had been conducted throughout the company's existence.

Chaikin, who was a highly recommended certified public accountant, began to work for

failure to comply with the mandatory requirements of subdivision (c) of the Rule, the advice to defendants which "must" be given before the plea is accepted.

On February 17, 1977 Judge Pierce denied the motion.⁹ Purporting to rely on the affidavits submitted by the defense, the judge found that prior counsel did not importune appellant to plead guilty because appellant had indeed acknowledged his guilt to counsel before pleading. In addition, Judge Pierce declined to apply the requirements of Rule 11 to the instant plea on the ground that the mandatory nature of those requirements was not articulated until this Court's decision in United States v. Journet 544 F.2d 633 (2d Cir. 1976), a month after appellant's plea. Ruling that Journet "constituted a significant departure from past practice and precedent in this District and Circuit" the judge concluded that it was not retroactive and that Rule 11, effective since December 1, 1975 did not apply to the September 28, 1976 guilty plea (App. "D" at 3-4).

(Footnote continued from last page) . . .

me in the mid 1950s. Over the years, he came to handle all of my personal and business accounting and financial transactions. With respect to Adlay, he was much more than an accountant or auditor. Unlike many businesses, Adlay never had an independent bookkeeping department or, for that matter, a comptroller for any period of time. Chaikin's accounting firm acted as my bookkeeper, my comptroller, my auditor, my accountant, my financial advisor and general overseer. (Affidavit in support of Motion to Withdraw the Plea, docketed as part of the Record on Appeal.

⁹ This District Court opinion is annexed as "D" to appellant's separate appendix.

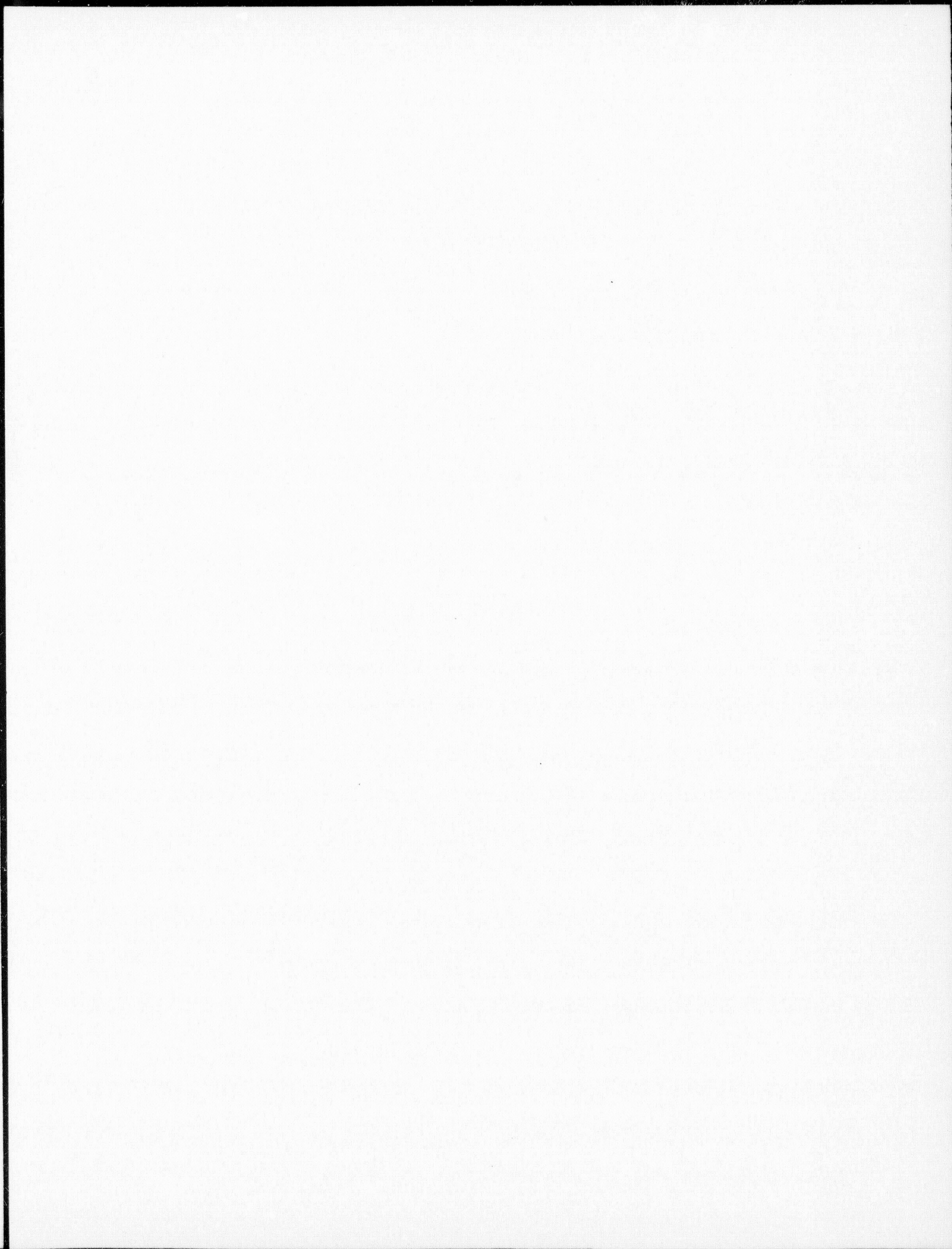
C. March 3, 1977 Sentence Proceeding

Judge Pierce sentenced appellant to concurrent two-year terms of imprisonment on Counts 3 and 6 and a consecutive one-year term of imprisonment on Count 22 (S.20-21¹⁰). The Judge further stated that if, prior to the appeal of this case, this Court were to hold that United States v. Journet, supra, 544 F.2d 633 were retroactive, he would entertain a motion to vacate the judgment (S.28).

¹⁰ Numerals in parenthesis preceded by the letter "S" refer to pages in the transcript of the sentencing dated March 3, 1977.

EDITOR'S NOTE

Pages 12 & 13 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.



ARGUMENT

Point I

THE DISTRICT COURT'S REFUSAL TO APPLY
FED. R. CRIM. P., RULE 11, EFFECTIVE
DECEMBER 1, 1975, TO APPELLANT'S
SEPTEMBER 1976 GUILTY PLEA WAS ERROR
AND THE FAILURE TO COMPLY WITH THAT
RULE MANDATES VACATUR OF THE CONVICTION
AND REMAND FOR AN OPPORTUNITY TO PLEAD
ANEW.

Fed. R. Crim. P. Rule 11 governs the taking of guilty pleas in the federal courts. The purpose of the Rule is two-fold: to insure that every defendant who pleads guilty is afforded the procedural safeguards which are intended to facilitate the determination of voluntariness, and to provide a complete record to facilitate disposition of post-conviction attacks on the validity of the plea. McCarthy v. United States, 394 U.S. 459, 465 (1969).

Toward that end, Congress in its 1974 amendment to Rule 11 (hereinafter the "new Rule") articulated for district court judges, specific instructions designed to insure that the plea is voluntary and that the record establishes that fact. Advisory Committee Notes to Rule 11, 18 U.S.C.A. at 20-21 (1975); United States v. Journet, 544 F.2d 633 (2d Cir. 1976).

The plea proceeding in this case violated, in substantial respect, several explicit provisions of the new Rule. The judge failed to inform appellant of the nature of the crime [Rule 11 (c)(1)]; that he had the right to persist in his plea of not guilty [Rule 11 (c)(3)]; that he had the right

to counsel at trial [Rule 11 (c)(3)]; that if he pleaded guilty there would be no further trial of any kind [Rule 11 (c)(4)]; and that if he pleaded guilty the judge could ask him questions about the crime and, if those answers were taken under oath, they could be used against him in a prosecution for perjury [Rule 11 (c)(5)].

Despite these obvious violations, Judge Pierce declined to apply the new Rule on the ground that although the plea was taken after the effective date of the Rule it occurred before this Court reviewed the Rule in United States v. Journet, supra, 544 F.2d 633, and Journet was not retroactive. This was error.

A.

The effective date of the 1974 Amendment to Rule 11 is December 1, 1975, some 10 months prior to appellant's September 28, 1976 plea. Clearly Congress intended that the new Rule become effective in December of 1975; it said so. And this Court acknowledged as much in United States v. Michaelson, Doc. No. 76-1559, slip. op. 2615, 2622 (2d Cir. March 31, 1977). Moreover, legislative history supports this interpretation because the very December 1, 1975 date was the result of a six month delay to enable all parties to the criminal justice system to familiarize themselves with the new Rule before it went into effect.

Congressman Wiggins noted:

The conferees agreed that the proposed amendments of the judicial conference as amended by H.R. 6799

should not take effect until December 1, 1975 so that all of the United States Attorneys, the United States Judges and the practicing bar will have ample notice that Congress has amended the proposals of the judicial conference and adequate opportunity to study both the proposals and amendments. 121 Cong. Rec., H. 7863 (daily ed. July 30, 1975).

No more time was needed. The requirements of the new Rule and its mandatory nature are apparent from the face of the Rule. Indeed, this court noted that "[i]t is difficult to conceive of clearer language" than appears in the new Rule. United States v. Journet, supra, 544 F.2d at 635. Obviously, there was no need for judicial interpretation of the Rule; the Rule, as Congress had intended, says it all. Id. at 635-636.

Consequently, no question of retroactivity is presented by this case. Retroactivity analysis is appropriate only for cases radically departing from precedent. Desist v. United States, 394 U.S. 244 (1969); Linkletter v. Walker, 381 U.S. 618 (1965); Ferguson v. v. United States, 513 F.2d 1011, 1012-1013 (2d Cir. 1975).¹¹

¹¹ Halliday v. United States, 394 U.S. 831 (1969), relied on by the District Court below is not to the contrary. Halliday was concerned with the retroactivity of that part of McCarthy v. United States, 394 U.S. 459 (1969), which held for the first time that vacatur of the conviction was the remedy for failure to comply with the rule.

While United States v. Journet, supra, 544 F.2d 633, was the first opportunity this Court had to consider violations of the new Rule, the opinion makes clear that Rule 11, as presently constituted, is self-explanatory. This Court described the new Rule as a Congressional "set of instructions" to district court judges and a "practical solution" to the problem of appellate determination of compliance with Rule 11. United States v. Journet, supra, 544 F.2d at 635, 636. In fact, the specificity of the new Rule inspired this Court to acknowledge what was in Journet a government concession, that "compliance with Fed. R. Cr. P. Rule 11 should be relatively easy for any careful district judge." Id. at 636.

Somewhat puzzling is the District Court's finding that the "each and every" holding of Journet constitutes a significant departure from past practice and precedent. Eight years ago in United States v. McCarthy, supra, 394 U.S. at 464 n.4, the Supreme Court held that "any" violation of Rule 11 was reversible error. Kloner v. United States, 535 F.2d 730 (2d Cir. 1976), relied on below, is inapposite. Kloner was a collateral attack (28 U.S.C. §2255) on a four-year old guilty plea taken under the old Rule 11. This Court held that under that Rule there was no violation in the failure to apprise the defendant of certain rights not enumerated in the rule. Kloner is therefore relevant only to those pleas taken before December 1, 1975 and is in no

way indicative of the Circuit's view of pleas taken under the new Rule.

Judge Pierce was clearly wrong when he found that Journet signalled a radical departure from prior Second Circuit law governing guilty pleas. Journet did not change the law, Congress did, and it made that change clearly and unequivocally, long before appellant pleaded guilty.

In any event, assuming arguendo that United States v. Journet, supra, was a dramatic change in the law, its holding still governs this case. Appellant's plea was still before the District Court when Journet was decided. Prior to the imposition of sentence, appellant, citing Journet, challenged the validity of the plea proceedings. The District Court's conclusion that Journet was not retroactive to this case was error.

Retroactivity analysis requires consideration of the now familiar three criteria: (1) the purpose to be served by the new rule (2) the extent of reliance by authorities on the old, and (3) the effect on the administration of justice of a retroactive application of the new standards. Desist v. U.S., supra, 394 U.S. at 249; Linkletter v. Walker, supra, 381 U.S. at 629; Ferguson v. United States, supra, 513 F.2d at 1012.

The purpose of the new Rule, the most significant factor in the trilogy (Desist v. United States, supra,

394 U.S. at 249), is more accurately to insure a valid waiver by the defendant of his rights and to create, for subsequent review, a detailed record of that waiver. United States v. Journet, supra, 544 F.2d at 635. That purpose is as clearly served by application of the new Rule to the defendant who is awaiting sentence as it is to the defendant awaiting plea. In each instance the defendant is before the District Court on the original proceeding. The interest in ascertaining the validity of the waiver is the same, as is the prospect of direct appellate review and, consequently, the need for an adequate record of the waiver.

The second factor -- the extent of reliance on the old rule -- also militates in favor of retroactivity in this case. The opinion below assumes that reliance on the prior Rule was "widespread," but that assumption is hardly conclusive because the new Rule had been in effect for almost a year at the time of the Journet decision. In fact, adoption of the new Rule, prior to Journet is probable, in light of the suggestion made by this Court some six months earlier that a specific set of instructions be adopted by District Court judges. United States v. Kloner, supra, 535 F.2d at 734.

Finally, the third factor -- the effect on the criminal justice system of retroactive application of the new Rule -- supports appellant's position. While Judge Pierce referred to "scores" of guilty pleas that would be

vacated, in reality the number must be relatively small. Retroactivity to this case would only affect that category of cases in which the plea occurred before Journet and the sentence after that decision. Moreover, the number would be reduced by the cases in which the defendant had not, prior to sentence, requested withdrawal of the plea and further, by the cases in which the defendant, despite the Rule 11 violation, is satisfied with the plea.

Balancing these considerations, it is clear that if United States v. Journet, supra, is found to be a break with the prior law in this Circuit, it nonetheless must have retroactive application to this case.

B.

The failure of the plea proceeding in this case to comply with the requirements of Rule 11(c) mandates that the conviction be vacated and the case remanded to permit appellant to plead anew. Fed. R. Crim. P., Rule 11; United States v. Journet, supra, 544 F.2d 633. Subdivision (c) of Rule 11 sets forth in detail the advice that the district court judge must give a defendant before a plea of guilty can be expected. The subdivision is mandatory and explicit in its terms. It provides that "[b]efore accepting the plea" the judge "must" "inform" the defendant and "determine that he understands" each of the enumerated elements of the Rule. The Advisory Committee notes reaffirm that this subdivision of the Rule is not intended to be permissive:

"Subdivision (c) prescribes the advice which

the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty."

Notes of Advisory Committee on Rule 11,
18 U.S.C.A. at 20.

A fortiori, the Rule establishes that this advice must appear in the record. Indeed, "assumptions" by the District Court judge in lieu of recorded proof have always been antithetical to the Rule.

The Supreme Court made clear under the old Rule that "[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered" that the requirements of the Rule have been satisfied. McCarthy v. United States, supra, 394 U.S. at 470 (emphasis in the original). With regard to the new Rule, this Court decided:

"...We now hold that, as minimum before accepting a guilty plea each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11. Otherwise the plea must be treated as a nullity."

In this case the violations of the Rule were not isolated and technical (Compare United States v. Michaelson, supra, slip. op. 2615, 2621-23) but rather were pervasive and fundamental. United States v. Journet, supra, 544 F.2d at 636. Discussion of each violation in the proceedings below follows seriatim:

1. The failure to inform appellant of the nature of the crime.

Rule 11(c)(1) provides in pertinent part:

"Before accepting a plea of guilty...the court must address

the defendant personally in open court and inform him of, and determine that he understands...

- (1) the nature of the charge to which the plea is offered ...

The origin of this requirement is the Due Process clause itself:

..."real notice of the true nature of the charge against him [is] the first and most universally recognized requirement of due process." Smith v. Grady, 312 U.S. 329, 334 (1941).

Obviously this portion of the rule is addressed to the defendant's comprehension of the law, not his conduct at the time the crime was committed. A factual basis for the plea is "totally irrelevant" to the question of whether the defendant understood the charge to which he was pleading. Irizarry v. United States, 508 F.2d 960, 966 n.6(2d Cir. 1974).

Indicative of the importance of this part of the plea proceeding is the fact that in the new Rule Congress added the direction that the judge take the initiative and "inform" the defendant of the nature of the crime. In contrast, the old Rule required only that the Judge determine that the defendant understood the crime charged. Obviously, Congress, in the 1974 amendment, intended to require more from the judge by way of explication of the crimes involved.

Here, Judge Pierce completely failed to inform appellant of the nature of the two types of crimes to which

he was pleading. Moreover, there was no meaningful determination that appellant understood the nature of the crime.¹² The record below revealed that there was no discussion of the elements of the crimes or what the Government would have to prove in order to establish guilt. Informing the defendant of the nature of the crime requires at least this much. Notes of Advisory Committee on Rule 11, 18 U.S.C.A. at 21; 8 J. Moore Federal Practice, supra, ¶11.02[1] at 11-23.

While the indictment was read and appellant acknowledged that his lawyer had explained the charge to him, that procedure was insufficient to compensate for the Judge's failure to instruct meaningfully on the nature of the crime. Majko v. United States, 457 F.2d 790, 791 (7th Cir. 1972); United States v. Cody, 438 F.2d 287 (8th Cir. 1971); see also, Irizarry v. United States, supra, 508 F.2d at 965.

"Reading the indictment and asking whether a defendant has discussed the charge with his attorney does not satisfy McCarthy."

Majko v. United States,
supra, 457 F.2d at 791.

This is particularly so when the indictment does not articulate all of the elements of the crime. Here Counts

¹²Indeed, the failure here was so complete that the proceeding did not even comply with the old Rule. Consequently, regardless of this Court's holding on the applicability of the new Rule to this case (see supra at pp. 15-20), the old Rule requires that the conviction be vacated. McCarthy v.

3 and 6 of the indictment are silent on the element of "intent." However, 18 U.S.C. §1014, the crime charged in those counts, requires specific intent to use the false statements to influence the bank in its actions.¹³ Kay v. United States, 303 U.S. 1, 5-6 (1938); United States v. Lentz, 524 F.2d 69, 71 (5th Cir. 1975). In this regard, the materiality of the falsehood is relevant; in order to establish intent, the falsehood must "have the capacity to influence" the bank.¹⁴ United States v. Braverman, 522 F.2d 218, 223 (7th Cir.), cert. denied, 96 S. Ct. 392 (1975); United States v. Goberman, 458 F.2d 226, 229 (3d Cir. 1972). The problem in this case is appellant was not informed of this element. In addition, the existence of lesser included offenses within the tax evasion charge¹⁵ renders fatal Judge Pierce's failure to explain the essential elements of Count 22. In McCarthy v. United States supra,

United States, supra, 394 U.S. 459; Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974).

¹³Obviously, a defendant can make false statements to a bank without intending to influence the actions of the bank. For example, a person with potential income tax problems may choose to undervalue his assets in a loan application; the falsity there is not intended to influence the bank -- he'll get the loan despite the undervaluation, -- but rather to protect himself from the possible investigation by Internal Revenue Service.

¹⁴Materiality is particularly relevant to appellant's case because he refused to acknowledge that the discrepancies in dollar amount that appear in the loan application were substantial (15).

¹⁵ The lesser included offenses as both misdemeanors:

394 U. S. at 467-8 n.20, where the charge was also income tax evasion, the Supreme Court made clear that such explication was a prerequisite to accepting the plea because without it there remained the possibility that the defendant believed himself guilty only of the lesser charge.

Because the nature of the crimes charged was not explained to appellant before he pleaded guilty, his conviction must be reversed.

2. The failure to inform the appellant of his right to persist in his plea of not guilty.

Rule 11 (c) (3) specifically provides that the defendant be told that he has the right to persist in his plea of not guilty. The Advisory Committee Notes make clear that this particular warning is viewed as the best way to convey to the defendant that he has a Fifth Amendment right not to incriminate himself. Notes of the Advisory Committee on Rule 11, 18 U.S.C.A. at 22. Judge Pierce failed to apprise appellant of that right. That he told appellant that he had the right not to incriminate himself does not sufficiently compensate for the deficiency. Rule 11 (c) (3) explicitly requires both warnings. Indeed, reaffirmation of the right to persist in the not guilty plea might well

wilfully filing false returns, (26 U.S.C. §7207) and wilfully failing to pay taxes (26 U.S.C. §7203).

¹⁶Specifically, the Notes provide:

"The rule takes the position that the defendant's right not to incriminate himself is best explained in terms

have been a turning point in appellant's decision to plead. In light of his subsequent assertions of innocence and undue pressure to plead by counsel, this missing advice might well have broken the momentum and given appellant the strength to pursue his belief in his own innocence.

3. The failure to inform appellant of his right to counsel at trial.

Rule 11 (c) (3) requires that appellant be told that if he goes to trial he has "the right to the assistance of counsel." Judge Pierce neglected to inform appellant of that right and the fact that appellant had counsel at the time of the plea did not alleviate the judge's responsibility. Rule 11 requires that a defendant be told of his specific right to counsel at trial.

4. The failure to inform appellant that if he pleads there will be no further trial of any kind.

Subsection (c) (4) of the Rule provides the defendant must be told not only that if he pleads he waives the right to a jury trial, but also that "there will not be any further trial of any kind." This particular advice was directed at defendants who believe that although they waive the right to a jury trial, some other kind of trial or

of his right to plead not guilty and to persist in that plea if it has already been made."

Notes of the Advisory Committee
on Rule 11, 18 U.S.C.A at 22.

proceeding will follow the guilty plea. United States v. Journet, supra, 544 F.2d at 636 n.5. The advice given to the defendant must disabuse him of that possible misconception. Merely telling the defendant that he waives his right to a jury trial - all that Judge Pierce did here -- is, under the explicit dictates of the Rule, insufficient.

5. The failure to inform appellant that if he pleaded the court could ask him questions about the crime.

Rule 11 (c) (5) provides that the defendant be informed that "if he pleads guilty, the court may ask him questions about the offense to which he has pleaded." Judge Pierce never warned appellant of this eventuality and on the facts of this case that was a critical omission. A warning from the judge that detailed answers about the crimes would have to be given -- answers appellant now maintains, were untrue -- might well have provided the reason appellant needed to withstand counsel's pressure to plead guilty.

The failure of the District Court to give advice as to "each and every" right enumerated in Rule 11, invalidates the plea. When, as here, the record reveals a wholesale violation of the Rule, vacatur of the conviction and remand for an opportunity to plead anew is mandated.

POINT II

IT WAS REVERSIBLE ERROR TO DENY
APPELLANT'S PRESENTENCE MOTION
TO WITHDRAW HIS GUILTY PLEA WHEN
THE REASONS FOR WITHDRAWAL WERE
THAT THE PLEA WAS BOTH VIOLATIVE
OF RULE 11 AND INVOLUNTARY.

Prior to sentence appellant moved, pursuant to Fed. R. Crim. P. 32(d), to withdraw his plea of guilty. Rule 32(d) provides:

A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Although Rule 32(d), does not give a defendant an absolute right to withdraw a guilty plea (United States v. Needles, 472 F.2d 652 (2d Cir. 1973), the Federal courts have uniformly held, in reliance on Kercheval v. United States, 274 U.S. 220, 224 (1927), that presentence motions should be granted wherever it would be "fair and just" to do so. It is generally agreed that:

"Rule 32(d) should be construed liberally in favor of the accused when a motion is made to withdraw before sentence is imposed. [citations omitted] The right of a jury trial is involved and that right has long held a favorite place in our law." United States v. Presley, 478 F.2d 163, 167 (5th Cir. 1973).

Therefore, where the motion asserts a valid ground for relief, taking into account the prejudice to the government, the Courts have held that withdrawal of the guilty plea should be "freely allowed." United States v. Michaelson, supra, slip. op. 2615, 2617-8. Nunez Cordero v. United States, 533 F.2d 723 (1st Cir. 1976); United States v. Cook, 487 F.2d 963 (9th Cir. 1973); United States v. Stayton, 408 F.2d 559, 561-62 n.6 (3d Cir. 1969); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964).

Here, in a context in which there was benefit rather than prejudice to the government in the interim between the plea and the motion to withdraw,¹⁷ appellant presented two valid grounds for withdrawing his plea. The District Court's refusal to grant the motion is reversible error.

Appellant's challenge to the validity of his plea on Rule 11 grounds was, alone, sufficient to require that the motion be granted. At the time of the motion the requirements of the new Rule 11 were clearly established in this Circuit. [United States v. Journet, supra, 544 F.2d 633], and the proceeding in this case was obviously replete with violation of the Rule. Therefore, even if Judge Pierce was

¹⁷ Appellant's plea of guilty precipitated Fialkow's plea, two days thereafter. Consequently, if the government were to go to trial now it would have the added advantage of being able to call Fialkow as a witness, an advantage it would not have but for appellant's plea.

correct in his finding that Journet was not retroactive - a finding appellant strenuously contests - the judge was nonetheless wrong to ignore the strictures of the Rule. Having learned from Journet what Rule 11 requires, it was incumbent upon him to use the opportunity presented by the pendency of the case to adhere to the new rule.¹⁸

This is particularly so when, as here, the plea was also challenged on the grounds that it was involuntary. The purpose of the new Rule was to establish a more accurate way to determine the voluntariness of the plea, and the failure to follow its mandate leaves any finding of voluntariness vulnerable to subsequent attack.

Indeed, Judge Pierce was wrong in his finding below that appellant's plea was voluntary. The judge's conclusion was based on a misapprehension of fact in the record, to wit, that appellant's own affidavits in support of the motion to withdraw the plea had established that appellant had admitted his guilt to counsel prior to pleading guilty. Nothing in appellant's motion papers supports such a conclusion. On the contrary, those papers make clear that appellant had

¹⁸ In most cases this could be simply accomplished by giving the defendant, who had not yet been sentenced, the option of repleading under the new Rule. It appears that some judges in the Southern District of New York have done exactly that. See, for example, United States v. Cortes-Rios, Doc. No. 76 Ct. 867 (Goettel, J.)

consistently maintained his innocence to his lawyer and that he had to be coached by this lawyer so that he would know what to say at the court proceeding in order to establish a factual basis for the plea.

On this record, appellant was entitled to withdraw his plea. United States v. Rogers, 289 F. Supp. 726 (D. Conn. 1968) (Timbers, D.J.). It is clear error for counsel to pressure his client into pleading guilty without first cautioning him, that he should not plead guilty unless he believes himself to be guilty.¹⁹ United States v. Rogers, supra, 289 F. Supp. at 729.

Judge Pierce's refusal to grant the presentence motion to withdraw the plea was clearly erroneous and should be reversed. United States v. Michaelson, supra, slip. op. at 2618.

¹⁹ At the very least appellant was entitled to a hearing to determine whether counsel exerted undue influence on him so as to render his decision to plead involuntary. 8A Moore's Federal Practice ¶32.07[4].

CONCLUSION

For the aforesaid reasons the plea should be vacated and the case remanded to give appellant the opportunity to plead anew.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Appellant
HOWARD E. SAFT
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel

Angelo T. Cometa
Sheila Ginsberg
David Richenthal
Jonathon Warner

Copy Received, subject to
Additional Appends
Robert B. Fiske, Jr.
US Attorney
By Steven Schatten
AUSA
6:00 PM 4/25/77